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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

15 VERNON UNSWORTH,
16 Plaintiff,
17 vs.
18 ELON MUSK,
19 Defendant.

| Case No. 2:18-cv-08048

Judge: Hon. Stephen V. Wilson

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE

Complaint Filed: September 17, 2018
Trial Date: December 2, 2019

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1 **I. INTRODUCTION**

2 To put Mr. Unsworth's Motions in Limine in context, Mr. Musk summarizes
3 here what he intends to prove at trial: Although Mr. Unsworth played a role in the
4 cave rescue's early days—by convincing Thai authorities to contact British cave
5 rescue divers and by suggesting where the boys likely were located—his role receded
6 after the boys were found and the focus turned to devising a way to safely extract
7 them, by diving them out. Mr. Unsworth was not a cave diver and did not have the
8 expertise needed to participate in those life-threatening aspects of the rescue, which
9 claimed the life of one Thai Navy Seal.

10 Nonetheless, Mr. Unsworth remained front and center to the media, providing
11 interviews on the status of the rescue efforts and reminding anyone who would listen
12 of the role he had played. The evidence will show that he intended to capitalize
13 monetarily on his role, and sought to remain the focus of the limelight. Mr. Unsworth
14 found a singularly effective way to do that: He went on an international news
15 broadcast, CNN, to tell the world that Mr. Musk did not care about the lives of the
16 boys and was engaging in only a PR stunt. That was just one part of Mr. Unsworth's
17 larger plan to highlight his role in the rescue and diminish the actions of others
18 involved—the Thai Navy Seals, the Governor of Chiang Rai, the British divers, and
19 the doctors who risked their lives diving to the boys to administer the sedatives
20 needed to implement the rescue—all in the service of his plan to sell the rights to his
21 version of the story for a large windfall.

22 Mr. Musk responded to Mr. Unsworth's unprovoked attack. His response
23 included calling Mr. Unsworth "sus" (for "suspicious"), and an insult ("pedo guy")
24 that was not literal and not meant to be taken literally. The context of this public
25 exchange is critical to understanding that. Context is also critical to the republication
26 of Mr. Musk's later statements about Mr. Unsworth. With the threat of a lawsuit and
27 a belief based on an investigator's reports that Mr. Unsworth was involved in
28 inappropriate and illegal activities, Mr. Musk sent an "off-the-record" email to a

1 BuzzFeed reporter directing him to further investigate Mr. Unsworth's background.
 2 Mr. Musk never intended for BuzzFeed to publish his off-the-record email. Yet,
 3 BuzzFeed published it anyway, contrary to its publicly-stated policies, and with input
 4 from Mr. Unsworth's attorney. This article, that Mr. Unsworth now says caused him
 5 great harm, lionized him and attacked Mr. Musk. Contrary to Mr. Unsworth's claims
 6 that he suffered actual, reputational and emotional damage as a result of this
 7 "publication," the evidence will show he has suffered no harm at all.

8 The evidence on these points is relevant and admissible. But Mr. Unsworth
 9 seeks to exclude almost all of it because it is counter to his narrative that he is a
 10 heroic victim being bullied by a billionaire. Mr. Unsworth wants to ignore that a
 11 defendant possesses the right to present evidence at trial to dispute the elements of a
 12 plaintiff's claims. And in a defamation case, including this one, in which Mr.
 13 Unsworth claims that Mr. Musk's statements about him were assertions of fact, were
 14 false, and harmed his reputation, Mr. Unsworth must accept Mr. Musk's right to
 15 present wide-ranging evidence about the plaintiff's reputation.

16 Mr. Unsworth, however, does not want to live by these rules. For example, he
 17 seeks to keep the jury from knowing that: (a) both Mr. Unsworth and his expert have
 18 admitted that they have no evidence that his reputation has been harmed, e.g., that no
 19 one believes that Mr. Unsworth is a pedophile or child rapist (No. 4); (b) Mr.
 20 Unsworth has been on a campaign, starting when the rescue was still underway, to
 21 claim fame and fortune for himself, while diminishing the role and recognition
 22 accorded everyone else involved, and that his damage-less lawsuit is a mere
 23 manifestation of that campaign (Nos. 2 and 7); and (c) he already had a negative
 24 business reputation due to a government determination that his company had engaged
 25 in unlawful business practices. (No. 5.) This evidence is relevant and admissible.

26 Similarly, the jury will have to decide whether it was "reasonably foreseeable"
 27 that BuzzFeed would republish Mr. Musk's "off-the-record" email. Yet, Mr.
 28 Unsworth seeks to exclude evidence that, in doing so, BuzzFeed was violating its

1 own publicly-posted policies, which BuzzFeed changed right after it published his
 2 “off-the-record” email. (No. 8.)

3 Mr. Unsworth also seeks to exclude evidence related to the credibility of his
 4 witnesses (Nos. 9 & 10), as well as witnesses and documents (recovered from his
 5 phone) that will show he has publicly overstated his contributions to the rescue and
 6 has been trying to generate publicity and money from it and diminish the roles of
 7 others. (No. 13.) The list goes on and on.¹ This evidence is material, relevant, and
 8 admissible. The Court should deny Mr. Unsworth’s motion.

9 **II. THE COURT SHOULD DENY PLAINTIFF’S EFFORTS TO EXCLUDE**
 10 **EVIDENCE ABOUT HIS REPUTATION AND THE LACK OF ANY**
 11 **HARM TO IT (MIL NOS. 4, 7, 2 & 5)**

12 A. **Because Mr. Unsworth Has Put At Issue His Reputation And Any**
 13 **Harm To It, He Cannot Keep The Jury From Hearing That He Has**
 14 **No Evidence Of Harm.**

15 Mr. Unsworth intends to tell the jury his story of victimization by Mr. Musk,
 16 and the purported injuries to his reputation and emotional well-being that, he claims,
 17 ensued. If Mr. Unsworth wants to offer that evidence, Mr. Musk has to be given the
 18 right to present evidence to the contrary, including evidence that Mr. Unsworth has
 19 not been harmed. But Mr. Unsworth does not want the jury to know that. Why?
 20 Because he has no facts or evidence that anyone in the world thinks he is a pedophile
 21 or believes what Mr. Musk said about him. (Michael Lifrak Opposition Declaration
 22 (“Lifrak Decl.”) Ex. 1 (Unsworth Tr. 94:20-95:1).) And his experts, who could have
 23 conducted surveys or focus groups on the issue, are similarly unable to identify

24 ¹ To be clear, however, Mr. Musk has no intention of asking Mr. Unsworth about
 25 child pornography, and has already agreed to refrain from asking about adult
 26 pornography. Nonetheless, because Mr. Unsworth has the burden to prove the falsity
 27 of Mr. Musk’s statements, and without knowing what doors Mr. Unsworth may open
 28 in the process, Mr. Musk requests the Court reserve his right to raise this issue if the
 need arises, with the Court’s permission.

1 anyone who believes what Mr. Musk said or thinks any less of Mr. Unsworth as a
 2 result. (Lifrak Decl. Exs. 2, 3 (Rose Tr. 183:14-184:6; Jansen Tr. 33:6-13).)

3 To prepare to rebut elements of Mr. Unsworth’s claim, Mr. Musk has adduced
 4 evidence that Mr. Unsworth has *not* been harmed. For example, after Mr. Musk said
 5 everything Mr. Unsworth is suing him over, Mr. Unsworth received extensive praise
 6 and publicity around the world: The Queen of England bestowed Mr. Unsworth with
 7 the Member of the Most Excellent Order of the British Empire (“MBE”) title, the
 8 King of Thailand honored him with the Royal Thai Insignia—King Commander
 9 (second class) Most Admirable Order of Direkgunabhorn, the British Royal Humane
 10 Society awarded him the Certificate of Commendation, and the British Chamber of
 11 Commerce Thailand awarded him its Social Impact Award (on behalf of the UK team
 12 involved in the rescue). (Lifrak Decl. Ex. 4 (Response No. 4).) Mr. Unsworth has
 13 been invited to speak at numerous events, contributed to books, and participated in
 14 two documentaries. (*Id.* at Response Nos. 3, 5, 7.) The objective evidence shows
 15 that no third parties have acted as if they thought any less of him because of Mr.
 16 Musk’s statements. The jury is entitled to hear this evidence.

17 **B. The Court Should Not Exclude Evidence of Lack of Harm (No. 4).**

18 As a basis to keep the jury from hearing evidence that Mr. Musk’s statements
 19 did not harm his reputation, Mr. Unsworth argues that those statements are libelous
 20 “per se” such that he is entitled to “presumed damages.” (Mot. at 9.) He then leaps
 21 to the conclusion that, in such cases, evidence of lack of injury is inadmissible. (*Id.*)

22 That is not the law. The case Mr. Unsworth cites, *Clay v. Lagiss*, does not
 23 support exclusion of this evidence. 143 Cal. App. 2d 441 (1956). There, the plaintiff
 24 did not put on affirmative evidence of harm to reputation, and instead relied solely on
 25 the presumption of harm. That is not what Mr. Unsworth is doing here. As he admits
 26 in his motion, he is seeking “to recover actual damages for negligent publication of
 27 false and defamatory statements.” (Mot. at 13.) He intends to introduce evidence of
 28 supposed harm, including of “actual reputational, emotional, and mental harm,” and

1 harm in the form of “stress, emotional distress, anxiety, and feelings of social
 2 isolation.” (Lifrak Decl. Ex. 4 (Response No. 1).) He plans also to have an expert
 3 testify—without evidence to support it—that Mr. Unsworth’s reputation has been
 4 “harmed.” (Lifrak Decl. Ex. 5 (Rose Report at 1) (“I will discuss the impact, effects,
 5 ramifications, and negative consequences resulting in damage to plaintiff.”).)

6 If Mr. Unsworth intends to offer evidence on any of these matters, he cannot
 7 preclude Mr. Musk from offering contrary evidence and from arguing that Mr.
 8 Unsworth has suffered no harm. *See, e.g., Newton v. Nat'l Broad. Co.*, 930 F.2d 662,
 9 671 (9th Cir. 1990) (reducing jury award of presumed damages “precisely because
 10 the court itself determined that Newton’s ‘outstanding reputation’ had been unharmed
 11 by the stories”); *Cohen v. Hansen*, 2016 WL 1688004, at *3 (D. Nev. Apr. 27, 2016),
 12 *aff'd*, 748 F. App'x 128 (9th Cir. 2019) (in presumed damages case, parties not
 13 “precluded from offering evidence of loss of reputation or business”); *Weller v. Am.
 14 Broad. Companies, Inc.*, 232 Cal. App. 3d 991, 1014 (1991) (holding “failure to
 15 prove special damages may be a factor in concluding that [presumed] damages for
 16 injury to reputation are excessive”); *Sleem v. Yale Univ.*, 843 F. Supp. 57, 61
 17 (M.D.N.C. 1993) (in majority of states, defendant permitted to show that there was no
 18 reputational injury, even though plaintiff was entitled to recover presumed damages).
 19 *See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765
 20 (1985) (White, J., concurring) (noting that traditionally “[t]he defendant was
 21 permitted to show that there was no reputational injury; but at the very least, the
 22 prevailing rule was that at least nominal damages were to be awarded for any
 23 defamatory publication actionable *per se*”).

24 Mr. Unsworth plans to stretch his right to “presumed damages” even further,
 25 by seeking such damages, and the exclusion of evidence of harm, for statements that
 26 are not libelous “per se.” His claim includes Mr. Musk’s tweet that he was “sus,” Mr.
 27 Musk’s apology, and Mr. Musk’s statements that Mr. Unsworth’s comments about
 28 him were untrue. (Compl., ¶ 113.) These are not libelous “per se” because they lack

1 any defamatory content in them that would direct a “reasonable reader [to] perceive
 2 ... a meaning which tended to injure [Mr. Unsworth’s] reputation in any [way],” even
 3 when read in the context of the entire dialogue. *Barnes-Hind, Inc. v. Superior Court*,
 4 181 Cal. App. 3d 377, 386 (1986). Thus, Mr. Unsworth is not entitled to damages for
 5 those statements unless he can show harm. For that reason alone Mr. Musk is entitled
 6 to present evidence as to the lack of harm to his reputation.

7 **C. The Court Should Not Exclude Evidence About Mr. Unsworth’s**
 8 **Efforts to Manage the Public’s Views About Him (No. 7).**

9 Mr. Unsworth claims that, in light of the Court’s ruling that he is not a limited
 10 purpose public figure, evidence of his efforts to obtain publicity for himself are no
 11 longer relevant. (Mot. at 12.) But that is not the only issue in this case to which this
 12 evidence pertains. That Mr. Unsworth has attempted to parlay his role in the rescue
 13 to fame and recognition is relevant to whether his reputation was actually harmed.
 14 As described above, even after Mr. Musk’s statements about him, Mr. Unsworth has
 15 sought and received awards, speaking engagements, and other praise. He wants to
 16 preclude that evidence. (*Id.*, citing money received from his fame, hiring an agent,
 17 and giving presentations.) The jury is entitled to hear this evidence in deciding
 18 whether Mr. Unsworth’s reputation has actually been harmed. *See, e.g., Wynberg v.*
 19 *Nat'l Enquirer, Inc.*, 564 F. Supp. 924, 927–28 (C.D. Cal. 1982) (allowing reputation
 20 evidence in libel case); *Marcone v. Penthouse Int'l Magazine For Men*, 754 F.2d
 21 1072, 1079 (3d Cir. 1985) (evidence of publicity about plaintiff in other
 22 circumstances was relevant to plaintiff’s “reputation” and to defamation damages).

23 **D. The Court Should Not Bar Evidence On Motives for Suing (No. 2)..**

24 Mr. Musk is entitled to argue to the jury that Mr. Unsworth’s suit does not arise
 25 from any actual harm but rather from his continued attempts to personally benefit
 26 from his role in the rescue. As noted above and elsewhere, Mr. Unsworth has
 27 consistently attempted to monetize his role in the rescue, working with an agent
 28 (Liffrak Decl. Exs. 6, 22), speaking with representatives of Warner Bros. and Netflix

1 (Liffrak Decl. Ex. 7, at VU03361, 73), and bragging about the “big offer” he would
 2 need to be paid if he were to participate in any movie or book project. (Liffrak Decl.
 3 Ex. 8.) But that has not been good enough. Mr. Unsworth has also used his fame to
 4 diminish others who participated in the rescue, including those who risked their lives.
 5 He stated that he would “make the divers suffer” because they were getting more
 6 fame than him. (Liffrak Decl. Ex. 7, at VU03370-71.) He took issue with the
 7 performance of the Thai Navy Seals (one of whom lost his life in the rescue). (*Id.* at
 8 VU03322, 27, 45.) He criticized the decision-making of the Chiang Rai regional
 9 governor. (*Id.* at VU03332, 37, 59.) And he tried to impede the efforts of the rescue
 10 divers to sell their stories in favor of his own attempts to do the same. (Liffrak Exs. 7,
 11 8.) This is not someone who has been harmed by Mr. Musk’s statements. It is
 12 someone trying above all to make a profit from the cave rescue. Evidence regarding
 13 his motivations is relevant for several reasons.

14 First, evidence that Mr. Unsworth filed this lawsuit motivated by fame and
 15 pecuniary gain, and not because he actually suffered emotional or reputational harm,
 16 bears directly on damages. In *Hopey v. Spear*, the plaintiff filed a motion in limine
 17 requesting the court “bar mention of the motive of Plaintiff in filing and prosecuting
 18 this action, as ascribing bad motives to a party is improper, irrelevant, and highly
 19 prejudicial.” 2016 WL 9665165, at *3 (C.D. Ill. June 23, 2016). The Court denied
 20 the motion in limine, noting that “Courts have allowed defense counsel to argue that,
 21 in seeking damages, a plaintiff’s motive behind filing suit was to obtain money,” and
 22 finding that “if evidence exists to show that Plaintiff had improper motives in
 23 bringing suit and *was exaggerating the extent of his injuries to obtain more money*,
 24 such evidence and argument would be very relevant.” *Id.* at *4 (emphasis added); see
 25 also *Gowder v. Bucki*, 2013 WL 6182964, at *2 (N.D. Ill. Nov. 26, 2013)
 26 (“[E]vidence relating to motive in bringing the instant action would be relevant for
 27 the jury in ascertaining whether to award [plaintiff] compensatory and punitive
 28 damages.”). Mr. Musk is entitled to probe whether the claimed damage to Mr.

1 Unsworth's reputation is the real reason he sued, including whether he is
 2 exaggerating his "injuries" for pecuniary gain. *Hopey*, 2016 WL 9665165, at *3.

3 Second, evidence of a plaintiff's motivation for litigating is admissible when it
 4 bears on credibility. Mr. Unsworth has presented himself as a victim of Mr. Musk.
 5 But he has not suffered any real harm, and the jury is entitled to hear what is driving
 6 this case. *See Miller v. Schmitz*, 2013 WL 5754945, at *3 (E.D. Cal. Oct. 23, 2013)
 7 (denying plaintiff's motion in limine to exclude evidence of motive for filing suit
 8 because it "may go to the issue of Plaintiff's motives, bias, and credibility"); *Ferreira*
 9 *v. City of Binghamton*, 2016 WL 4991600, at *15 (N.D.N.Y. Sept. 16, 2016) (denying
 10 plaintiff's motion in limine to exclude "evidence or argument alleging that Plaintiff's
 11 motive for filing the lawsuit was a purely pecuniary one," because "evidence at trial
 12 may make such argument appropriate").

13 Third, whether Mr. Unsworth has ulterior motives for bringing this lawsuit is
 14 relevant to his allegation that Mr. Musk defamed him by challenging the truth of his
 15 comments. (Compl., ¶ 116.) He avers that he "is not a liar." (*Id.* at ¶ 125.) Thus,
 16 evidence that could show that Mr. Unsworth is a liar, including that he is not being
 17 forthright about the reasons for filing this case, is relevant to his substantive claims.

18 **E. The Court Should Not Exclude Evidence of Unsworth's Business**
 19 **Reputation (No. 5).**

20 In 1999, regulatory authorities in England investigated and publicly
 21 reprimanded Mr. Unsworth's firm, Burgess Wreford and Unsworth. (Lifrak Decl.
 22 Ex. 4 (Response No. 10).) In 2004, the Financial Services Compensation Scheme,
 23 declared a default against a related entity, BWU Limited. (*Id.*)

24 Publicly-available documents show that government agencies in England,
 25 where Mr. Unsworth conducted his business activities, reprimanded and fined his
 26 companies for writing an "excess number of protection and investment policies" that
 27 led to the failure of the business. In its findings the British authorities "wish[ed] to
 28 make clear the condemnation of such practices," which were "an imprudent,

1 improper, and reckless form of business financing.” *See*
 2 <http://www.m2.com/m2/web/story.php/1999852568440080DDE88025683B005E451>
 3. These proceedings were publicized and remain available online. *See, e.g., id.*;
 4 https://www.fscs.org.uk/uploaded_files/Publications/declarations/2004/Declarations_02_Nov_2004.pdf; and <https://www.stockmarketwire.com/article/498717/Have-YOU-lost-money-to-one-of-these.html>. Mr. Unsworth has inserted his business reputation into the case by claiming that Mr. Musk has harmed it:

- 8 • His complaint alleges that “[a]s the direct and proximate result of
 9 Musk’s false and defamatory accusations, Mr. Unsworth suffered
 10 damages to his reputation in the State of California, as well as on a
 11 national and international basis.” (Compl., ¶ 103.)
- 12 • His expert, Eric Rose, plans to testify that Mr. Unsworth “suffered
 13 negative consequences” from Mr. Musk’s statements, including “loss of
 14 goodwill” and “reduced trust in **working relationships with peers and**
 15 **future business partners.**” (Lifrak Decl. Ex. 5 (Rose Report, p. 23)
 16 (emphasis added).)
- 17 • Mr. Rose also plans to testify about “harm [the statements] have done to
 18 Mr. Unsworth’s personal and professional reputation.” (*Id.* at p. 32.)

19 Under these circumstances, Mr. Musk is entitled to present evidence about Mr.
 20 Unsworth’s pre-existing reputation in this same field. *See, e.g., Bularz v. Prudential
 21 Ins. Co.*, 93 F.3d 372, 378–79 (7th Cir. 1996) (evidence of general reputation in
 22 business dealings deemed “relevant to determining whether [plaintiff’s] reputation
 23 was already compromised at the time that [defendant] allegedly defamed him, and
 24 thus to the jury’s computation of damages”); *see also World Wide Ass’n of Specialty
 25 Programs v. Pure, Inc.*, 450 F.3d 1132, 1138 (10th Cir. 2006) (district court did not
 26 err in admitting evidence of other, unrelated media reports that may have also
 27 damaged plaintiff’s reputation, because other sources of harm to reputation were
 28 relevant to the quantum of damages); *Schafer v. Time, Inc.*, 142 F.3d 1361, 1372

1 (11th Cir. 1998) (“Since the plaintiff’s character is substantively at issue in a libel
 2 case ... Rule 405(b) permits the admission of evidence regarding specific instances of
 3 the plaintiff’s conduct on that issue.”); *Wynberg*, 564 F. Supp. at 927–28.

4 The cases Mr. Unsworth cites do not hold otherwise. *HTC Corp. v. Tech.*
 5 *Props.*, in which the court held that reputation evidence regarding a bankruptcy was
 6 not admissible (Mot. at 11), was a patent case that had nothing to do with defamation.
 7 2013 U.S. Dist. LEXIS 129263, at *6-7 (N.D. Cal Sept. 6, 2013). Mr. Unsworth’s
 8 other cases dealt with issues unrelated to the alleged harm to reputation, such as drug
 9 use. *See* Mot. at 10 (citing *Meyer* and *Sanders*). Here, Mr. Unsworth’s negative
 10 business reputation is directly relevant to whether Mr. Musk’s statements had any
 11 impact on that same aspect of his reputation. Mr. Unsworth cannot claim harm to his
 12 reputation while blocking Mr. Musk from presenting evidence showing what his
 13 reputation actually was previously.

14 **III. THERE IS NO BASIS TO EXCLUDE EVIDENCE ABOUT BUZZFEED**

15 **A. Evidence About BuzzFeed’s Policies Is Relevant (No. 8).**

16 Much of Mr. Unsworth’s case arises from the content of an email Mr. Musk
 17 sent to BuzzFeed, which it unilaterally published despite his having labeled it “off-
 18 the-record.” (Compl., Ex. K.) At the time, BuzzFeed’s publicly-available policies
 19 said nothing about requiring an “agreement” between a reporter and source to go off
 20 the record. (Lifrak Decl. Ex. 9.) BuzzFeed added such a requirement not long *after*
 21 Mr. Musk sent the “off-the-record” emails and *after* Mr. Musk told BuzzFeed that, if
 22 it published his “off-the-record” email, it would be violating journalistic ethics.
 23 (Lifrak Decl. Ex. 10.) All of this is relevant to whether it was reasonably foreseeable
 24 to Mr. Musk that BuzzFeed would republish his email. If BuzzFeed had not
 25 republished it, Mr. Unsworth could not have sued Mr. Musk for writing it. But
 26 BuzzFeed did, and whether Mr. Musk is liable for BuzzFeed’s republication is a
 27 central issue in dispute.

28

1 Mr. Unsworth argues that because “[r]easonable foreseeability is an objective
 2 standard, ... Musk cannot show that the BuzzFeed Standards have any relevance ...”
 3 (Mot. at 13.) He has it backwards. What those publicly-available policies say goes
 4 directly to the issue of whether a reasonable person would foresee that BuzzFeed
 5 would republish an email in violation of its own policies. And the fact that BuzzFeed
 6 changed its policies after its episode with Mr. Musk to add an “agreement”
 7 requirement provides further evidence about the lack of any such requirement at the
 8 relevant time and whether it would be reasonable to require Mr. Musk to foresee that
 9 the republication would violate those policies. *See Lewis v. Davis*, 2019 WL 764749,
 10 at *5 (N.D. Tex. Feb. 21, 2019) (attributing all facts in the public domain to a
 11 reasonable member of the public for the reasonable person standard); *cf. Staehr v.*
 12 *Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 432 (2d Cir. 2008) (because inquiry
 13 notice is objective standard, publicly-available information relevant to inquiry).

14 Mr. Unsworth argues that the BuzzFeed standards should be excluded also
 15 under Federal Rule of Evidence 403, because the “jury could be confused into
 16 thinking the issue of foreseeability boils down to BuzzFeed’s published Standards
 17 which Musk was not even aware of at the time of his email.” (Mot. at 14.) But
 18 again, Mr. Unsworth has claimed that reasonable foreseeability is an objective
 19 standard. If it is, then it does not matter whether Mr. Musk had seen the BuzzFeed
 20 standards ahead of time. If Mr. Unsworth wants the issue tried on Mr. Musk’s
 21 subjective beliefs about foreseeability of republication, Mr. Musk will agree.

22 **B. There Is No Basis To Exclude Evidence About Mr. Unsworth’s**
 23 **Failure to Sue BuzzFeed (No. 3).**

24 Mr. Unsworth’s argument that Mr. Musk should be prohibited from
 25 introducing evidence that Mr. Unsworth did not sue BuzzFeed or from arguing that
 26 BuzzFeed is responsible for some or all of Mr. Unsworth’s damages lacks
 27 merit. First, Mr. Unsworth’s failure to demand a retraction is directly relevant to his
 28 failure to mitigate damages. *Desnick v. Am. Broad. Companies, Inc.*, 1999 WL

1 51796, at *2 (N.D. Ill. Jan. 29, 1999) (“[D]efendants are not precluded from offering
 2 the lack of a request for retraction as evidence of failure to mitigate damages” even
 3 where state law “does not require plaintiffs to request retraction as a prerequisite to
 4 recovering damages.”). Second, a republisher is liable for the republication, even if
 5 the publication was not reasonably foreseeable to the original publisher, *see Shively v.*
 6 *Bozanich*, 31 Cal. 4th 1230, 1243 (2003), and Mr. Unsworth’s decision to sue only
 7 one party bears on his motivations for filing the suit, *see supra* at 7–9. Finally, at a
 8 minimum, this motion is premature until Mr. Unsworth presents his evidence on the
 9 issue of “reasonable foreseeability” of the republication of Mr. Musk’s email.

10 **IV. THE COURT SHOULD NOT EXCLUDE OTHER EVIDENCE**

11 **A. The Court Should Not Exclude Evidence Regarding Mr. Unsworth’s** 12 **UK Lawsuit Against Mr. Musk (No. 1).**

13 Mr. Unsworth’s complaint seeks damages on a world-wide basis, “with the
 14 exception of the reputational damage he suffered in England and Wales.” (Compl., ¶
 15 108.) He filed a separate claim against Mr. Musk in England for defamation and
 16 “malicious falsehoods,” seeking damages and an injunction. (Lifrak Decl. Ex. 21.)

17 Mr. Unsworth’s plan went awry at his deposition, when he conceded that he
 18 could not “separate out” any alleged injury on a country-by-country basis. (Lifrak
 19 Decl. Ex. 1 (Unsworth Tr. 246:21-247:9).) His counsel thereafter stated that “it
 20 would not surprise me” if he withdrew the England/Wales “carve-out” from his
 21 complaint. (*Id.* at 245:5-22.) On September 3, 2019, Mr. Unsworth stated his
 22 intention to do so and, for the first time, sought a stipulation to that effect. (Lifrak
 23 Decl. Ex. 11.) When the parties then met and conferred, Mr. Musk said he was not
 24 willing to agree, given that discovery had closed and the trial was approaching.
 25 (Lifrak Decl. Ex. 12.)

26 During the meet and confer, Mr. Musk told Mr. Unsworth that, if he wanted to
 27 remove the carve-out and expand the scope of this case, he needed to move to amend
 28 his complaint. Mr. Unsworth refused, stating he would simply raise the issue at the

1 Final Pre-Trial Conference, the week before trial. (*Id.*) His complaint remains as
 2 filed, and he has given no notice that he has withdrawn his UK claim.

3 Mr. Unsworth is therefore stuck with “carve-out” for any damages he believes
 4 he sustained in England and Wales. (Compl., ¶ 108.) He cannot somehow “amend”
 5 his complaint at the Final Pre-Trial Conference. Except for amendments made before
 6 an answer or pursuant to stipulation, Mr. Unsworth needs leave of Court to amend his
 7 complaint. Fed. R. Civ. P. 15(a)(2). He has made no such motion—intentionally—
 8 and he cannot do so at the Final Pre-Trial Conference. In *Buckeye Assoc., Ltd. v. Fila*
 9 *Sport, S.p.A.*, the plaintiff tried to do just that. 931 F.2d 59 (9th Cir. 1991). It sought
 10 to include a new theory—“in essence, an attempt to amend the complaint at the
 11 pretrial conference.” *Id.* at *2. The District Court did not allow it, finding that “it
 12 had ample time to seek leave to amend the complaint and state the new theory” prior
 13 to the pre-trial conference and failed to do so. *Id.*

14 Given Mr. Unsworth’s carve-out, the jury cannot be left to speculate as to why
 15 it exists. It should know that Mr. Unsworth has sued Mr. Musk in England and is
 16 seeking damages there. To not say anything would invite confusion and speculation,
 17 which can be avoided by letting the jury know the truth. None of the cases Mr.
 18 Unsworth cites support the erroneous and misleading view of the evidence he wants
 19 the jury to hear. Mr. Musk is not seeking introduction of “findings” from other
 20 lawsuits, as in *Um Corp. v. Tsuburaya*, 2017 U.S. Dist. LEXIS 218369, at *25-27.
 21 Mr. Musk wants the jury to know only that there is another lawsuit pending, and that
 22 is why it is being asked to carve-out damages from England and Wales.

23 Nor is there any potential for unfair prejudice to Mr. Unsworth. He argues that
 24 “a jury may believe that Unsworth should get a lower recovery (or no recovery at all)
 25 due to the possibility of a recovery in the UK.” (Mot. at 4.) But that is the point. Mr.
 26 Unsworth should obtain a lower recovery in this case because, pursuant to the carve-
 27 out in his complaint, the jury cannot include in its consideration any damage he
 28 claims to have suffered in his home country.

1 There is an additional and equally important reason to admit evidence that Mr.
 2 Unsworth has brought claims in multiple jurisdictions. The jury is entitled to know
 3 that Mr. Unsworth's motivation is not to repair a reputation for which he has no
 4 damage of harm, but to gain a windfall through a global litigation campaign. *See,*
 5 *e.g.*, *Hopey*, 2016 WL 9665165, at *3 ("Courts have allowed defense counsel to argue
 6 that, in seeking damages, a plaintiff's motive behind filing suit was to obtain
 7 money."); *see also* Section II.B *supra* (evidence regarding motives).

8 **B. The Court Should Not Exclude Evidence Concerning Mr.**
 9 **Unsworth's Relationship with his Family (No. 6).**

10 Mr. Unsworth seeks to preclude Mr. Musk from offering evidence that Mr.
 11 Unsworth abandoned his wife and daughter when he moved to Thailand, and that his
 12 daughter refuses to communicate with him as a result. (Mot. at 11-12.) But Mr.
 13 Unsworth injected this topic into the litigation by claiming damages based on the
 14 alleged emotional harm Mr. Musk's statements caused to his former family.

15 Mr. Unsworth admitted this in his interrogatory responses. The purported
 16 harm Mr. Musk's statements caused, and for which he seeks compensation, include
 17 "stress, emotional distress, and anxiety because of the pain Defendant's accusations
 18 have caused to [his] family, including ... his wife Vanessa (although separated), his
 19 daughter Danielle" (Lifrak Decl., Ex. 4 (Response No. 1).) Mr. Musk has a right
 20 to present evidence about Mr. Unsworth's relationship with his family:

21 First, Mr. Musk is entitled to present evidence that contradicts Mr. Unsworth's
 22 claim that he is concerned about emotional harm to his former family. For example,
 23 in *Cobige v. City of Chicago, Ill.*, the Seventh Circuit determined that, where
 24 emotional distress of a decedent's son was at issue, the opposing party could present
 25 negative evidence regarding their relationship because it was "relevant to how much
 26 loss [the] son suffered by her death." 651 F.3d 780, 784 (7th Cir. 2011), *as amended*
 27 *on denial of reh'g* (Sept. 8, 2011).

28

1 Second, Mr. Musk has the right to probe the alternative causes of Mr.
 2 Unsworth's claimed emotional harm and whether it is based on his abandonment of
 3 his wife and daughter, as opposed to any pain they suffered on account of what Mr.
 4 Musk said about him. (Lifrak Decl. Ex. 13 (Vanessa Unsworth Tr. 33:20–35:2).)
 5 Where a plaintiff alleges “that he suffers from significant and substantial emotional
 6 distress as a result of Defendants’ conduct, a party may seek to challenge a claim for
 7 emotional distress damages by offering evidence of other stressors in a plaintiff’s
 8 life.” *Smith for J.L. v. Los Angeles Unified Sch. Dist.*, 2018 WL 6137133, at *2 (C.D.
 9 Cal. Feb. 13, 2018). Therefore, “[o]nce a plaintiff ‘opens the door’ to this issue, the
 10 plaintiff cannot block a defendant’s challenge to her damages by objecting to the
 11 introduction of evidence that pertains to her mental or emotional health.” *Id.*

12 In *Smith for J.L.*, plaintiff alleged he suffered emotional harm as a result of
 13 actions taken by his middle school, and sought to block evidence of other abuse in his
 14 life. The court held that “[i]f Plaintiff is seeking emotional distress damages from
 15 Defendants on the grounds of Defendants’ conduct toward him, it is reasonable for
 16 Defendants to cross examine Plaintiff’s witnesses with evidence pertaining to
 17 Plaintiff’s emotional health.” *Id.* at *3. As such, the court refused to grant a motion
 18 in limine to exclude evidence of “events which may have played a role in any
 19 emotional distress he is suffering,” stating that “even if the evidence is not ultimately
 20 admitted for substantive purposes, Defendants may seek to use such evidence for
 21 impeachment.” *Id.*; see also *Equal Employment Opportunity Comm’n v. Peters’
 22 Bakery*, 301 F.R.D. 482, 486 (N.D. Cal. 2014) (regarding plaintiff’s damages for
 23 emotional distress, court held that “Defendant retains the opportunity to cross-
 24 examine [plaintiff] concerning other stressors in her life that may have contributed to
 25 her alleged emotional distress” as well as “examine percipient witnesses or submit
 26 other evidence to show that the claim [for emotional distress] is exaggerated or false.
 27 All of these avenues of discovery provide ample fairness to marshal evidence to
 28 defeat Plaintiff’s claims.”).

1 Because, Mr. Unsworth wants to use his former family members as a vehicle to
 2 obtain damages for himself, Mr. Musk is entitled to present evidence that points to
 3 other sources of emotional harm to them, including damage inflicted by Mr.
 4 Unsworth himself, by leaving them to fend economically and emotionally for
 5 themselves so that he could live with another woman, 6,000 miles away.

6 **C. The Court Should Not Exclude Tik's Testimony Regarding Big**
 7 **Kren or Jobpub.com (Nos. 9 and 10).**

8 Mr. Unsworth seeks to exclude evidence and testimony regarding his partner,
 9 Tik, who gave an interview to the Thai news outlet, Big Kren, that reported: "When
 10 asked about Elon Musk's accusation that her husband was a pedophile, Tik said that
 11 her husband found that humorous." (Lifrak Decl. Ex. 14.) Mr. Unsworth also seeks
 12 to preclude evidence and testimony regarding a post Tik made on the Jobpub.com
 13 discussion board regarding night work, in which a web user with Tik's email address
 14 (to which Tik testified that only she has access) made the following post: "There are
 15 lots of types of night work. I work at night. The money's good, too. But you need a
 16 bit of fortitude. You can contact me." (Lifrak Decl. Ex. 15.)²

17 To be clear, the issue is not whether the Big Kren article or the post to
 18 Jobpub.com should be admitted.³ Mr. Musk does not currently intend to offer them
 19 into evidence. Thus, there is no need to resolve issues regarding authentication and
 20 hearsay. Tik's testimony on those issues, however, goes to her credibility. Mr.
 21 Unsworth plans to present that through her videotaped deposition. (Lifrak Decl. Ex.
 22 16.) Tik's deposition testimony on these issues, e.g., her denial of ever speaking to
 23 Big Kren, or saying what they reported she said, and her denial of ever posting to

24 ² This statement was also translated at Tik's deposition as: "What kind of work do
 25 you want? There are several kinds of work? I also work at night and I got good
 26 money for it. But it is hard work. You can contact me." (Lifrak Decl. Ex. 17 (Tik.
 Depo., 101:3-7).)

27 ³ For context, Mr. Unsworth's complaint alleges that Mr. Musk labeled him a sex-
 28 trafficker and disclaims that he was. (Compl. at ¶¶121-122.)

1 Jobpub.com, go to her credibility, which can be judged from her testimony. Mr.
 2 Musk should not be denied his only ability to cross-examine Tik on her credibility by
 3 playing excerpts from her deposition that show she is not a credible witness.

4 **D. The Court Should Not Exclude Evidence of Pedophilia (No. 11).**

5 Mr. Musk has no intention of presenting evidence at trial regarding Mr.
 6 Unsworth's or any witnesses' pornography tendencies, adult or otherwise. However,
 7 in Mr. Unsworth's lawsuit regarding accusations of pedophilia, the truth or falsity of
 8 that allegation is relevant. If Mr. Unsworth opens the door to pornography in his
 9 case-in-chief, Mr. Musk cannot be foreclosed from exploring it, with the Court's
 10 approval at trial.

11 **E. The Court Should Not Exclude Third-Party Tweets (No. 12).**

12 Mr. Unsworth's proposed expert, Eric Rose, plans to opine that Mr. Musk
 13 intended the term "pedo guy" to mean "pedophile." (Lifrak Decl. Ex. 5 (Rose Report
 14 at 4 ("[H]e intended his accusation literally"), 8 ("[H]e wanted Mr. Unsworth to be
 15 viewed as a pedophile.")); Ex. 2 (Rose Tr. at 110:13-14 ("pedo guy ... is short for
 16 pedophile.").) Mr. Rose plans to base his testimony on "tweets where Mr. Musk was
 17 on the thread, and people were obviously commenting that 'pedo guy' means
 18 'pedophile.'") (Lifrak Decl. Ex. 2 (Rose Tr. 126:21-127:18).)

19 If Mr. Unsworth's expert is allowed to opine on the definition of "pedo guy"
 20 by relying, in part, on Twitter comments, then Mr. Musk is entitled to cross examine
 21 that witness with other Twitter posts that say the opposite—that "pedo guy" is an
 22 insult used in South Africa and not meant literally. (Lifrak Ex. 18).⁴ *See Local 159,*
 23 *342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 189 F.3d 473, 1999 WL 547400, at *9
 24 (9th Cir. 1999) ("Every expert will make decisions as to which pieces of evidence to
 25 rely on; on cross-examination the opposing party is entitled to challenge why the

26
 27

⁴ Under Fed. R. Evid. 902(13), (14), authentication issues can be remedied by
 28 certifications that these tweets do indeed appear on the Internet.

1 expert seemingly ignored certain evidence.”); *see also Brennan v. Reinhart*
 2 *Institutional Foods*, 211 F.3d 449, 451 (8th Cir. 2000) (“allowing an expert to testify
 3 about facts and data outside of the record for the limited purpose of exposing the
 4 factual basis of the expert’s opinion” but stating that “[e]ffective cross-examination
 5 can then highlight the weaknesses in the expert’s opinion”); *United States v. Stone*,
 6 222 F.R.D. 334, 339 (E.D. Tenn. 2004), *aff’d*, 432 F.3d 651 (6th Cir. 2005) (counsel
 7 could elicit hearsay testimony from expert “on cross-examination” because “the
 8 purpose of the out-of-court statements would not be for hearsay purposes but rather
 9 would be for evaluating the merit of the opinions offered on direct examination).

10 **F. The Court Should Not Preclude Witnesses With Knowledge Of Mr.**
 11 **Unsworth’s Role in the Rescue (No. 13).**

12 Mr. Unsworth asks the Court to exclude two witnesses on Mr. Musk’s trial
 13 witness list, Ben Reymenants and Ray Lightfoot (aka Raymond Huber), on the
 14 grounds that they were not disclosed as potential witnesses until Mr. Musk served his
 15 trial witness list on November 1. The Court should deny this request.

16 First, Mr. Unsworth knows who they are, from his contact with them during the
 17 rescue, and from his documents that discuss Mr. Reymenants and Mr. Huber. (Lifrak
 18 Decl. Ex. 19.)

19 Second, Musk’s counsel was first able to reach and speak with these witnesses
 20 on October 27, 2019. (Lifrak Decl., ¶22.) Mr. Musk disclosed them that same week,
 21 with his list of trial witness. (Lifrak Decl. Ex. 20.) Mr. Musk could not have
 22 disclosed that he might be using these witnesses earlier because his counsel had not
 23 spoken with them. Under these circumstances, not including these witnesses in initial
 24 disclosures was “substantially justified.” Fed. R. Civ. P. 37(c)(1). *See McKesson*
 25 *Info. Sols., Inc. v. Bridge Med., Inc.*, 434 F. Supp. 2d 810, 813 (E.D. Cal. 2006)
 26 (denying motion in limine to exclude late noticed witnesses “[b]ecause these
 27 witnesses were otherwise made known to [Defendant] during the course of litigation,
 28 there is no prejudice to [Defendant] in allowing the witnesses’ testimony at trial.

1 Fed.R.Civ.P. 37(c)(1)."); *Design Strategies, Inc. v. Davis*, 228 F.R.D. 210, 212–13
2 (S.D.N.Y. 2005) (substantial justification found where plaintiff was already familiar
3 with the late-noticed witness, and plaintiff had not provided any information to
4 contradict defendant's explanation for belated addition).

5 Both witnesses are listed as ones Mr. Musk “may present” at trial. Both were
6 involved in the cave rescue and would be called only to impeach Mr. Unsworth’s
7 testimony about the rescue, to the extent needed. As such, Mr. Musk was under no
8 obligation to disclose them, even if he had contacted them earlier (which he had not).
9 See Fed. R. Civ. P. 26(a)(1)(A)(i) (not requiring disclosure of witnesses used “solely
10 for impeachment.”).

11 | V. CONCLUSION

12 For the foregoing reasons, Mr. Musk respectfully requests that the Court deny
13 Mr. Unsworth's motions in limine.

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